

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
Federal-State Joint Board on)
Universal Service)
Western Wireless Corporation)
Petition for Preemption of an)
Order of the South Dakota)
Public Utilities Commission)

CC Docket No. 96-45

PETITION FOR RECONSIDERATION
OF PROJECT TELEPHONE COMPANY AND RANGE TELEPHONE COOPERATIVE

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SUMMARY

Project Telephone Company and Range Telephone Cooperative request reconsideration of the Commission's Declaratory ruling which is inappropriate procedurally, without support in the record and inconsistent with the Communications Act and the Commission's prior decisions. The Ruling will adversely effect Project and Range because it, inappropriately decides a dispositive issue in the pending proceeding involving Western Wireless' application for designation as an Eligible Telecommunications Carrier on the Crow Reservation in a manner which is against their interests.

The Ruling purports to remove uncertainty by concluding that a state determination that an applicant for Eligible Telecommunications Carrier designation must first provide service throughout the service area has the effect of prohibiting entry by competing carriers. The only such state determination in the record is that of the South Dakota Public Utilities Commission which concluded, on the basis of a hearing record, that it would not grant ETC designation to Western Wireless unless it actually "offered or provided" the supported service. Because the issue is also before the South Dakota Supreme Court, the Ruling appears designed to advise that court that the Commission will preempt, if the Court does not reverse the SDPUC.

Although the question of whether such a ruling actually had a prohibitory effect was debated on the record before both commissions, the Ruling ignores both the fact that the issue was contested and this Commission's prior determinations that declaratory rulings are inappropriate where there are material issues of contested facts. The Ruling also ignores the fact that the SDPUC held, in the alternative, that even if prior offering or provision of service was not

required, Western Wireless had not met its burden of establishing that it would provide the supported services. This alternative holding nullifies the existence of any real uncertainty.

The basis of the Ruling is the Commission's conclusion that a ruling similar to that of the SDPUC will, in fact, prohibit the provision of competing service. This factual conclusion is reached without any reference to the record, or the arguments of several parties to the contrary. The conclusion that a second carrier cannot compete in a high cost area without knowing whether it will receive support ignores the context of the Western Wireless application in South Dakota . There Western Wireless proposed to use its existing cellular infrastructure to provide a wireless local loop which would require only the addition of terminal equipment at customer premises when service is ordered. There is, therefore, no basis to conclude that costs of competitive service would be comparable to those of the incumbent. Also, because Western Wireless proposes a broader calling scope than the incumbents, it need not have a similar basic monthly rate in order to compete.

The Ruling also ignores the arguments on the record that the plain meaning of Section 214(e) is that a current offering of service is required for ETC designation. The statute is framed in the present, not future tense. Even assuming, *arguendo*, the Ruling correctly analyzed the statute, there would then be no reason or uncertainty requiring a Section 253 analysis.

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PETITION FOR RECONSIDERATION

Project Telephone Company (“Project”) and Range Telephone Cooperative (“Range”), pursuant to Section 1.106 of the Commission’s Rules, respectfully petition the Commission for reconsideration of its Declaratory Ruling (“Ruling”) in this proceeding, released August 10, 2000, FCC 00-248. The Ruling is inappropriate procedurally, without support in the record, inconsistent with the statute and the Commission’s precedents, and will adversely affect Project and Range.

I. INTRODUCTION: INTEREST OF PROJECT AND RANGE

The Commission’s Ruling follows a petition by Western Wireless for preemption of a decision of the South Dakota Public Utilities Commission (“SDPUC”) which denied Western Wireless’ request for designation as an Eligible Telecommunications Carrier (“ETC”) throughout South Dakota.¹ Western Wireless sought preemption of the SDPUC conclusion that Western

¹ *Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, June 23, 1999 (“Petition”). The Ruling also refers to a letter to the Chairman from

Wireless must first offer or provide the services required for universal service support prior to being eligible for ETC designation. The Commission's Ruling concluded that a requirement that supported services be offered prior to designation violates Section 253(a) of the Communications Act and does not come within the safe-harbor of Section 253(b). The Ruling did not, however, preempt the SDPUC, but held the Western Wireless Petition in abeyance pending the decision of the South Dakota Supreme Court by the appeal of the SDPUC of a lower court decision.²

Project and Range are adversely affected by the Ruling because it, in effect, resolves certain aspects of Western Wireless' application to this Commission pursuant to Section 214(e)(6) of the Communications Act for ETC designation in portions of their service areas within the Crow Reservation in Montana.³ The issue of whether Section 214(e) designation must be granted upon a statement of intentions, or whether actual provision of the supported services throughout the service area may be required, is contested in the Crow proceeding, but is essentially resolved against Project and Range in the Ruling.

Project and Range did not participate in the South Dakota proceeding at an earlier stage because the comment period in the Commission's Crow Reservation proceeding was subsequent

Competitive Universal Service Coalition, an entity which includes Western Wireless.

² Ruling at 2.

³ Western Wireless, *Petition for Designation as An Eligible Telecommunications Carrier on the Crow Reservation*, CC Doc. 96-45, DA 99-1847. Western Wireless was apparently unaware that Range serves a portion of the Crow Reservation and did not mention Range in its Petition. Western Wireless asked only for designation on the Crow Reservation where it alleged the Montana PSC does not have jurisdiction, but suggested this Commission could grant it ETC status for that portion of Project's study area which is not on the Reservation. Petition at 14, n.26.

to the comment times in the South Dakota case. Based on the Commission's previous rulings, Project and Range reasonably expected that critical issue of whether the SDPUC decision had "the effect" of prohibiting the ability of Western Wireless to provide telecommunications service would be decided upon the factual record before the SDPUC and this Commission. Project and Range could not have reasonably anticipated that the Commission would assume that a requirement that a carrier provide service prior to designation prohibits competitive entry.⁴ The Ruling, however, determines the prohibition issue without reference to any record evidence in either proceeding, thereby potentially establishing a precedent to foreclose consideration of the factual record in the Crow proceeding. Therefore, Project and Range are entitled to seek Reconsideration of the Ruling.

II. THE DECLARATORY RULING IS INAPPROPRIATE

In its Ruling, the Commission has chosen, in effect, to respond to a petition for preemption by assuming the factual conclusion that the SDPUC's ruling (or one to the same effect) has "the effect" of prohibiting competitive entry, the central issues raised in the Western Wireless Petition, without concern for, or recognition of, the actual disputed facts on the record before either commission. The Commission has established the principle that declaratory rulings are generally not appropriate for cases involving disputes of material facts.⁵ Nevertheless, by

⁴ The Commission's prior decisions which are based on specific factual findings of material effect are discussed in Section III, below.

⁵ See, *Fifth Report and Order and Notice of Proposed Rulemaking*, CC Docket No. 96-262, 14 FCC Rcd 14221, 14317 (1999), (declaratory ruling request denied where significant

adopting this Ruling it has ignored that policy and precedent as well as a record showing that essential facts are in dispute, and reached a factual conclusion without any reference to the record.

The Ruling refrains from specifically preempting the SDPUC decision for the stated reason that the review of the decision is pending before the state supreme court. Because there is no other such decision, there would be no controversy to resolve by declaratory ruling if the Commission did not intend to address the SDPUC decision.⁶

Specifically, the Ruling *finds* that an interpretation of Section 214(e) similar to that adopted by the SDPUC “has the effect of prohibiting the ability of prospective entrants from providing telecommunications services.”⁷ This *finding* is made without discussion of any relevant or material evidence of record or otherwise. The finding also ignores the SDPUC alternative finding that even if prior offering or provision of service is not required, Western Wireless’ support of its application was so lacking in specifics and credibility that the SDPUC could not

disputes among parties as to both facts and law). *Memorandum Opinion and Order*, American Network, Inc. Petition for Declaratory Ruling Concerning Backbilling of Access Charges, 4 FCC Rcd 550, 551 (1989) (“A declaratory ruling may be used to resolve a controversy if the facts are clearly developed and essentially undisputed.”).

⁶ The Commission does, however, misstate the holding of the SDPUC, whose sixth Conclusion of Law was that “an ETC must be actually *offering or* providing the services supported by the federal universal service support mechanisms.” Public Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier, *Findings of Fact and Conclusions of Law, Notice of Entry of Order*, Public Utilities Commission of the State of South Dakota, TC98-146, May 19, 1999 Slip Op. p.5-6 (“SDPUC Decision”)(emphasis added). The significance of this omission is discussed in Part III, below.

⁷ Throughout the Ruling, the Commission refers unspecifically to “an interpretation of section 214(e),” but the particular interpretation of the South Dakota Commission is the only one which has taken such a view and the only one before this Commission.

accept its statement of intention as *bona fide*.⁸ The existence of this alternative holding of the SDPUC effectively nullifies the existence of any real uncertainty unless this Commission is prepared to assert the authority to conduct a *de novo* review of the record of the hearing and conclude that the South Dakota commissioners who sat at that hearing could not have reasonably found as they did.

The Ruling does cite the comments of several parties supporting Western Wireless, but none of those comments provide any support beyond the opinion of their counsel that the SDPUC decision in fact has the effect of prohibiting the provision of telecommunications services.⁹ The comments of other parties to the contrary are completely ignored, thereby masking the existence of a factual dispute over a material issue.¹⁰ Western Wireless made no showing whatever on the record before the SDPUC that a designation prior to offering service was necessary. In fact, the SDPUC pointed out that in the proceeding before it, Western Wireless “neither *offered* or proved that it was *able to offer* services designated for universal service.”¹¹

⁸ SDPUC Decision at 4, para. 22.

⁹ Ruling at n. 22. ALTS, for example, states that the SDPUC decision “clearly has the effect of prohibiting...from entering,” but supplies no facts whatsoever. ALTS does quote wonderfully from Joseph Heller’s masterpiece, *Catch 22*, but the SDPUC decision is only a *Catch 22* if the factual premise is accepted, i.e., that a requirement to provide service before designation *in fact* has the effect of prohibiting entry (i.e., it must be true that if you ask to get out of the Air Force you are necessarily not crazy). As discussed, *infra*, there is no basis whatsoever to find such a fact.

¹⁰ See, Coalition of Rural Telephone Companies, Opposition 14-15, 24-27, Reply, 8-12; U S West, Comments, 11. The point of this section is that the Ruling resolved a material factual dispute contrary to Commission precedent and without reference to the record. The merits of that resolution are discussed in Section III, below.

¹¹ SDPUC Comments at 12.

The Commission no doubt has great latitude to structure its proceedings, but its discretion is not unlimited. At a minimum, the Commission is obligated to either follow its precedents that it will not adopt declaratory rulings where facts are in dispute, or explain why those precedents are not applicable in this situation.¹²

III. THERE IS NO BASIS FOR THE COMMISSION'S CONCLUSION THAT THE SDPUC'S DECISION HAS THE EFFECT OF PROHIBITING THE PROVISION OF TELECOMMUNICATIONS SERVICE

The heart of the Commission's Ruling is its finding in paragraph 12 that a requirement that a carrier must provide the supported services before being designated an ETC has the effect of prohibiting prospective entrants from providing telecommunications service. The Ruling explains this conclusion with the statement that a new entrant will not be able to provide service in those areas where universal service support is essential to the provision of affordable telecommunications service and the incumbent receives support.¹³ The unstated assumption of this statement is necessarily that the new entrant's cost to provide service will be comparable to, or exceed that of the incumbent, i.e., that support is essential for all carrier regardless of the means of providing service.

Western Wireless' Petition for Preemption offered a hypothetical example in support of its point that it could not provide service without receiving universal service support, but provided

¹² "[A]n agency choosing to alter its regulatory course 'must supply a reasoned analysis indicating that its prior policies and standards are being deliberately changed, not casually ignored.'" *Action for Children's Television v. F.C.C.*, 821 F.2d 741, 745 (D.C. Cir. 1987).

¹³ Ruling at 6, paras. 12-13.

no actual data and did not even suggest that its hypothetical was representative of any particular carrier or group of carriers.¹⁴ Western Wireless assumed the cost of serving a high cost area is \$100 and that the ILEC receives \$75 in support. In this circumstance, Western Wireless claims that a competitor could not enter the market with a price of \$100 and compete with an incumbent with a price of \$25. All things being equal, this statement appears logical, but all things are not equal and the hypothetical bears no relation to the real world as it exists in South Dakota (or anywhere else).¹⁵

In all of its state ETC applications, Western Wireless has extolled the efficiency of its plan to provide service using its existing cellular network to provide service using a wireless local loop technology for which the only additional investment required is a terminating device (and possibly an antenna) at the customer's premise.¹⁶ Except for acknowledging that the cost of this equipment amounts to a few hundred dollars, Western Wireless has refused to provide any other information concerning the costs or disposition of its network.¹⁷ In this context, there is no basis

¹⁴ Petition at 11.

¹⁵ Although the Commission is not bound by the Federal Rules of Evidence, it should at least recognize the general rule that a tribunal should not rely on hypotheticals which assume facts inconsistent with the record or are unsupported by the evidence. See, *Fusselman v. Ennia General Insurance Co.*, 872 F.2d 642, 654 (5th Cir. 1989); *D.Fluckey v. Chicago & Northwestern Transportation Co.*, 838 F. 2d 302, 303 (8th Cir. 1988).

¹⁶ See, e.g., Direct Testimony of Gene DeJordy, Minnesota Cellular Corporation's Petition to Become an Eligible Telecommunications, MPUC Doc. No. P-5695/M-98-1285 at 13: "The provisioning of a universal service offering using a wireless local loop does not require any changes to MCC's network."

¹⁷ Western Wireless withdrew its application in Montana rather than respond to information requests approved by the Montana PSC. Letter from Ronnie London to Magalie Roman Salas, Secretary, Nov. 23, 1999. Western Wireless has also refused to specify what its

for the Commission to assume that Western Wireless will have comparable costs to the incumbent wireline carriers whose costs per loop are a matter of public record. To the contrary, Western Wireless' costs of service may well be much lower than that of the incumbents.

Thus in the hypothetical, if the incumbent's cost is \$25 net of support and the new entrant's cost is \$25 instead of \$100 with no support, there is no basis for a conclusion that the lack of support can be said to have the effect of prohibiting entry. Even where the new entrants net cost is higher, it is not necessarily at a competitive disadvantage if it offers service advantages, such as broader calling scope than the incumbent.¹⁸ Thus if carrier A must recover \$20 per month to offer a service which connects to 1000 other customers on a toll free basis, while carrier B must recover \$30, but its service will reach 10,000 other subscribers, carrier B is not necessarily disadvantaged by its lack of support because it is able to offer a service that provides almost seven times the calling scope ($1000/20=5$; $10,000/30=33.333$; $33.333/5=6.67$) for a 50% increase in price.

service price will be, or exactly what the scope of its offering will be. This vagueness led the SDPUC to conclude that Western Wireless' application was not credible, because its claim not to know what it would charge for service indicated that it do not even have a business plan. SDPUC Decision at 4, para.24: "The Commission finds that GCC's statements on pricing demonstrate the lack of a clear, financial plan to provision fixed wireless service throughout the state." Alternatively, Western Wireless may well have a business plan, but denies that it knows the specifics in order to avoid discovery in the state proceedings.

¹⁸ Western Wireless' applications have gone to great pains to point out the differences between its service and that of the incumbent, including such factors as offering a larger calling scope and an alleged "mobility component." See, e.g. Reply Comments of Western Wireless, Petition for Designation as an Eligible Telecommunications Carrier and for Related Waivers to Provide Universal Service to the Crow Reservation, Montana , Oct. 27, 1999 at 15.

The investment cost of premises equipment Western Wireless uses is also of a fundamentally different nature than the costs of constructing a network. Because it claims it will use its existing cellular mobile infrastructure, Western Wireless' capital requirements will occur only as it acquires customers. Construction of a network however, whether wireline or wireless, requires substantial capital expenditure prior to obtaining the first customer. Thus there is even less reason to conclude that in fact the SDPUC order has the effect of prohibiting entry.

At this point the it must be noted that the Ruling refers to a requirement to *provide* service, but omits any reference to the fact that the SDPUC's specific conclusion was that a carrier "must be actually *offering or providing*" the supported services prior to designation. (emphasis added) The distinction between the two terms is significant where the claim is that the SDPUC's rule would require commitment of substantial investment at the risk of not being designated eligible for support. Since by Western Wireless' own statements it need only provide customer premise equipment to be able to *provide* the service, it has no investment requirements at all *to offer* the service. To the extent it then attracts customers, its increase in investments will be accompanied by proportionate increases in revenue. The SDPUC's extensive discussion, based on an on-the-record evidentiary hearing, explains that Western Wireless failed to make sufficiently clear what service it was offering. In the circumstance where the SDPUC could not understand Western Wireless' proposal, it was entirely legitimate for it to require at least an actual offering of service.

Of course it may well be that in order to provide adequate service, Western Wireless will have to make extensive improvements to its infrastructure and really will need support in order to

offer service at a competitive price.¹⁹ But whether it will have such additional costs or not is entirely speculative because there is no information whatever on the record of either Commission as to whether its existing network can accommodate additional traffic or what costs Western Wireless will incur beyond the subscriber unit and antenna.²⁰ The necessary implication of Western Wireless' claim that it can provide the supported services over its existing infrastructure is that substantial enhancement will not be necessary. Where the Commission is totally without any basis for assuming that costs are comparable, it can reach no conclusions about whether the lack of prior designation of ETC status has the effect of prohibiting entry.

In any event, the issue before the Commission is not whether a lack of support prohibits entry, but whether the lack of designation prior to entry prohibits entry. Western Wireless has provided no basis whatever to support a speculation that even if it were actually offering or providing the service, it would be denied designation by the state. The criteria are after all limited, straightforward and objective as to the areas served by non-rural companies. For areas served by rural companies, an additional public interest finding is required, but resolution of the "chicken and egg" question in Western Wireless' favor gets it no closer to resolution of that

¹⁹ As noted above, because its large calling scope would allow subscribers to avoid paying IntraLATA toll charges that are in addition to the basic monthly charge of the incumbent, Western Wireless' basic rate can be substantially more than the incumbent's and still be competitive.

²⁰ These factors are especially relevant to the state's decision if it is to grant designation based upon promises and intent rather than performance, because a showing that the infrastructure has been engineered to carry traffic loads with substantially different characteristics from mobile traffic is probative of whether the applicant actually will offer voice grade service.

public interest issue.²¹

Western Wireless' argument that a requirement that it actually be providing service in order to receive ETC designation prohibits it from entering the market must also be considered in the context of South Dakota where 70% of the incumbent access lines do not receive high cost support today.²² Thus, whether or not it receives support has no bearing on Western Wireless' ability to serve the majority of subscribers in the state because it will only receive support if it serves portions of the remaining 30% of the access lines.²³

In its previous decisions involving Section 253(a) the Commission has emphasized that the state action must have a *material* effect on the new entrants ability to enter the market.²⁴ In the Minnesota case, for example, the Commission based its decision on evidence that the cost differential between constructing along freeways or along trunk highways created a cost differential substantial enough to make the later infeasible.²⁵ In the California Payphone case, the

²¹ Note that the public interest finding required in the areas of rural telephone companies is in addition to, but does not displace, the requirement of Section 214(e)(2) that all designations of a second ETC be "consistent with the public interest..."

²² Opposition of Coalition of Rural Telephone Companies at 25.

²³ In all the states where Western Wireless currently has or is seeking ETC designation, after the "Hold Harmless" support terminates, support will only be available in Wyoming in the area served by non-rural companies.

²⁴ California Payphone Association Petition for Preemption, *Memorandum Opinion and Order*, CCB Pol. 96-26, 12 FCC Rcd, 14191, 14206, Para. 31 (1997). ("California Payphone").

²⁵ Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way. *Memorandum Opinion and Order*, 14 FCC Rcd 21697, 21710 (1999).

Commission stated that in determining “effect” claims “we consider whether the Ordinance materially inhibits or limits the ability of any competitor to compete....”²⁶ In TCI Cablevision the Commission stated that the burden is on the party seeking preemption to demonstrate that a requirement has the “effect” of prohibiting its entry.²⁷ In this case however, the Commission has neither explained the basis for such a conclusion, nor explained why it should not follow its own precedents.

IV. THE PLAIN MEANING OF SECTION 214(E) AND THE COMMISSION’S RULES SUPPORTS A CONCLUSION THAT SERVICE MUST BE PROVIDED PRIOR TO DESIGNATION.

The Commission concluded, in effect, that in addition to violating Section 253(a) , the SDPUC has incorrectly read Section 214(e). In particular, it asserts that the requirement of Section 214(e)(1) that a designated carrier offer and advertise its supported services are actions that are required after designation, and are only prerequisites to actually receiving support.²⁸ Section 214(e)(2), which is the operative section, however, speaks in the present tense that a state commission shall (or may) designate a second ETC that *meets* the requirements of paragraph (1). It cannot be said that a carrier meets a requirement if the requirement is that it do something in

²⁶ California Payphone at 14206.

²⁷ TCI Cablevision of Oakland County, 12 FCC Rcd 21396, 21440 (1997).

²⁸ Ruling at 6-7. The results-oriented, as opposed to logical, approach of the ruling is apparent from the order of its consideration of issues. If Section 214(e) were properly determined to require prior service, there would be no opportunity to consider if such a requirement violates Section 253(a).

the future. Therefore, the most natural reading of the statute is that it establishes a present tense requirement.

The Ruling entirely fails to discuss the contentions on the record that the statute itself establishes a present requirement to offer the supported services. If Congress had intended to provide for designation of carriers that promise to meet the requirements, it knew how to say so. As with much of the 1996 Act, the wording and the relationship between subsections are undeniably awkward, but awkwardness is not ambiguity where the plain meaning can nevertheless be discerned. But even recognizing the latitude the court have allowed the Commission to interpret the Communication, if the statutory construction were as straightforward as the ruling supposes, there would be no reason to discuss Section 253 at length prior to turning to the meaning of Section 214(e).

It is true as the Ruling points out that both wireline and wireless carriers may have “gaps” in their coverage, but the nature of the gaps is not comparable.²⁹ The rural wireline carriers have facilities which pass virtually all inhabited locations while the wireless carriers have gaps in their signal coverage where there are existing potential customers.³⁰ A wireline carrier may have to construct new facilities to reach a customer at a new premises or who did not previously request service. It is well known, however, that gaps in wireless coverage exist at locations where

²⁹ Ruling at 7-8.

³⁰ Typically, the rural ILECs in South Dakota were constructed pursuant to an REA (now RUS) area coverage design established as a condition of receipt of loan funds.

customers live or travel and customers have little choice but to accept this fact.³¹ In the context of the South Dakota proceeding in which Western Wireless denied there was any reason to place a signal in the home area of one of the commissioners, the requirement of the SDPUC of actual service is eminently reasonable.³²

V. CONCLUSION

While purporting not to decide the Petition before it to preempt the South Dakota Public Utilities Commission, the Commission has nevertheless stated very clearly to that Commission, and the South Dakota Supreme Court, “Unless you follow our interpretation of the law, we will preempt you!” In so doing, the Commission has assumed a conclusion as to a contested matter of material facts, without any reference to a record, or even acknowledgment that the facts are disputed. The Commission’s Ruling is therefore inconsistent with its own precedents as to the proper subject for declaratory rulings, and its precedents that a state rule must be shown to have a material effect of prohibiting entry before it will be preempted. The Commission’s statutory analysis of Section 214(e) is inconsistent with the plain meaning and fails to even address the arguments in the record.

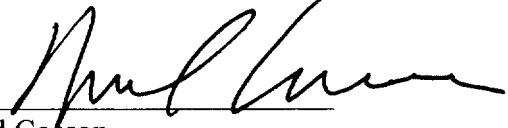
³¹ The Ruling’s disposition of the “gaps” issue also adversely affects Project and Range, who provided uncontested evidence in the Crow proceeding that Western Wireless’ signal did not adequately cover the central community on the Reservation, Crow Agency.

³² Transcript of SDPUC hearing at 105-106, quoted in Opposition of the Coalition of Rural Telephone Companies at 7.

On reconsideration, the Commission should abandon its preemption decision clothed as an advisory ruling unless it addresses the relevant and material record evidence as to the decisional facts involved.

Respectfully submitted,

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Certificate of Service

I, Nancy Wilbourn, of Kraskin, Lesse, & Cosson, LLP, 2120 L Street, Suite 520, Washington, DC 20037, hereby certify that a copy of the foregoing "Petition for Reconsideration", was served this 11th day of September, 2000, by first class, U.S. Mail, postage prepaid to the following parties:


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